Filed 5/12/10 P. v. Griffin CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT EARLE GRIFFIN,

Defendant and Appellant.

F056640

(Super. Ct. No. BF118715A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Louis P. Etcheverry, Judge.

Laura Schaefer, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lloyd G. Carter and Leanne Le Mon, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Ardaiz, P.J., Levy, J. and Dawson, J.

A jury found Robert Earle Griffin (appellant) guilty as charged of six counts of lewd and lascivious acts with a child under the age of 14 (Pen. Code, § 288, subd. (a))[1] and one count of continuous sexual abuse of a child (§ 288.5, subd. (a)). All of the offenses involved one victim, appellant's adopted daughter L. The trial court sentenced appellant to 16 years in the state prison for the violation of continuous sexual abuse and stayed sentence on the remaining counts.

On appeal, appellant contends that the trial court prejudicially erred in giving an instruction on the use of evidence of uncharged sex offenses to show propensity. We disagree.

FACTS

L., who was 16 years old at the time of trial, began living with appellant when she was five years old. When L. was eight, she was adopted by appellant and his wife, Mrs. Griffin, and lived with them in a household that included L.'s brother and sister.

After appellant adopted L., his relationship with her changed, and he began touching her in a manner that made her uncomfortable. L. estimated that this type of uncomfortable touching occurred more than 30 times. The first time, when L. was eight, appellant called her into the back bedroom of the house and directed her to touch his penis. She complied, but did not tell Mrs. Griffin because she was "afraid."

The second incident, also when L. was eight, occurred while she was sitting on the couch with a pillow on her lap watching television. Appellant was sitting next to her and her sister was on the other side of her. Appellant used his hand to touch L.'s vagina over her clothing.

When L. was 12 years old, appellant called her into the back bedroom and told her to touch his penis. She complied. Appellant touched L.'s leg with one hand and placed his hand on his penis and moved it up and down. Mrs. Griffin walked in while this was

[1]All further statutory references are to the Penal Code unless otherwise stated.

going on and threatened to call child protective services. She "kicked" appellant and L. out of the house. The next day, appellant and L. moved into a motor home.

While appellant and L. lived in the motor home, appellant told L. to remove her clothing and lie on the bed. He then directed her to open her legs. Appellant lay on top of her naked for approximately one hour. Appellant repeated this behavior more than three times while L. was under the age of 14. On one occasion, appellant lay on top of her and rubbed his penis against her vagina. While they lived in the motor home, appellant put his mouth on her vagina, and on another occasion, he told her to orally copulate him. Appellant also touched L.'s breasts while they were in the motor home, and he began kissing her with his tongue. She estimated that he fondled her breasts five times and "tongue kissed" her three times a week.

After living in the motor home for approximately 10 months, appellant and L. moved back into the home with Mrs. Griffin. The abuse continued and, after a few months, Mrs. Griffin again "kicked [them] out." Appellant and L. moved to another town.

When L. was 14 years old, she ran away and contacted the police department about the abuse. On April 9, 2007, in a pretextual telephone call to appellant, L. told appellant she was tired of him touching her. Appellant said he was sorry and that he was "finished." When appellant asked if L. was somewhere where other people could hear her, she said she was in the bathroom at a friend's and no one else could hear her. Appellant then said he had only done things that she said he could, like touch her leg and behind. Appellant explained that he would have stopped if she had asked him to. L. asked appellant if he would stop touching her "thing." Appellant responded by saying "I will stop touching you at all," because she was his daughter, not some "mother f-er slut" and there would be "no more tongue."

Later in the call when L. asked if she could stop touching his penis, appellant assured her that she did not have to do any of "that" anymore. He told her he loved her and missed her. L. asked appellant if she could be pregnant because appellant rubbed his

penis on her. Appellant responded that she could not be pregnant because "it has to go inside of your [*sic*] and I have to squirt." He acknowledged that "mom caught us," but claimed they weren't doing anything. He also acknowledged that it was his fault, but also "a little bit" L.'s fault.

DISCUSSION

CALCRIM No. 1191

Appellant's only contention on appeal is that the trial court committed prejudicial error by instructing the jurors in the language of CALCRIM No. 1191, which concerns evidence of uncharged offenses offered as circumstantial evidence to prove predisposition. Appellant argues that, since no evidence of uncharged offenses was presented, the instruction permitted the jury to infer criminal propensity from evidence pertaining to a charged offense (count 7) to prove the other charged offenses (counts 1-6) by a preponderance of the evidence standard, undermining the due process requirement that proof of guilt of a charge be made beyond a reasonable doubt. We find no prejudicial error.

The procedural history is as follows. Following a jury conference held off the record, the trial court read into the record the jury instructions that would be given, including a modified version of CALCRIM No. 1191. According to the court, these were the instructions that the parties and court agreed upon. Following closing argument, the court read the modified version of CALCRIM No. 1191 as follows:

> "The People presented evidence that [appellant] committed the crimes of between 2 and 30 separate charges[2] that were not charged in this case. These crimes are defined for you in these instructions that I have given you. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that [appellant], in fact, committed the

[2]Appellant contends that the trial court instructed the jury that the prosecution "presented evidence that [appellant] committed the crimes between 2 and 30 separate charges *of 288a* that were not charged in this case" (italics added), but the reference to section 288a, or more correctly to section "288A," is in the written version of the instruction and not in the reporter's transcript of the court's oral reading of the instruction.

> uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by the preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this uncharged offense as evidence entirely. [¶] If you decide that [appellant] committed the uncharged offenses, you may, but are not required to, conclude from that evidence that [appellant] was disposed or inclined to commit sexual offenses, and based on that decision also conclude that [appellant] was likely to commit and did commit the crimes alleged in Counts 1 through 7. If you conclude that [appellant] committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that [appellant] is guilty of the charged offenses. The People must still prove each element of every charge beyond a reasonable doubt. Do not consider this evidence for any other purpose except for the limited purpose of determining [appellant]'s disposition to commit sexual offenses."

The difficulty with appellant's argument is that he never raised it in the trial court either by objecting to the giving of CALCRIM No. 1191, or requesting a limiting instruction further clarifying the use of CALCRIM No. 1191 when applied to the facts given.

Initially, the parties disagree over whether any claim of error was forfeited by appellant's failure to object to the instruction at trial. Where a party claims on appeal that a legally correct instruction was too general or incomplete and in need of clarification, the party must show that it requested modification, clarification or amplification in the trial court or the contention is forfeited. (*People v. Valdez* (2004) 32 Cal.4th 73, 113; see also *People v. Reliford* (2003) 29 Cal.4th 1007, 1012 [CALJIC No. 2.50.01, which contains similar language to that in CALCRIM No. 1191, is correct statement of the law].) In addition, the failure to object to an instruction has been held to forfeit a claim that an instruction was improperly given because it was unsupported by the evidence. (See, e.g., *People v. Valdez*, *supra*, at p. 137 [involving CALJIC No. 2.06, consciousness of guilt instruction].) But no objection is necessary to preserve a claim that an instruction violated a defendant's substantial rights. (§ 1259; *People v. Kelly* (2007) 42 Cal.4th 763, 791.)

Assuming without deciding that appellant has not forfeited his claim, we nonetheless reject his argument. Appellant argues that the trial court's reference to "between 2 and 30 separate charges that were not charged in this case," referred to L.'s testimony that she had been repeatedly touched in a sexual manner from the time she was eight until she was 14. Because the crime of continuous sexual abuse of a child, as charged in count 7, covered that same time period, appellant argues the instruction allowed the jury to use evidence of a charged offense (§ 288.5 in count 7) to prove the other charged offenses (§ 288, subd. (a) in counts 1-6) under the lesser propensity standard as stated in CALCRIM No. 1191, thereby violating his right to due process.

Appellant was charged in counts 1 through 6 with separate acts of lewd and lascivious conduct, in violation of section 288, subdivision (a). The jury was instructed that to find appellant guilty of these charges, the People had to prove that appellant willfully touched any part of a child's body or caused a child to touch her body or the defendant's body, and that the act was committed with the intent to arouse himself or the child and the child was under the age of 14 at the time. (CALCRIM No. 1110.) Count 7 alleged that there was continuous sexual abuse between October of 2000 and October of 2006. Pursuant to section 288.5, subdivision (a), this charge required the People to prove appellant lived in the same household as the child, who was under the age of 14 at the time, and that he engaged in three or more acts of substantial sexual conduct or lewd or lascivious conduct with the child over at least a three-month period. (CALCRIM No. 1120.)

The prosecutor argued the following acts constituted the offenses charged in counts 1 through 6. Count 1: The first incident, when L. was eight, occurred when appellant called her into the back bedroom of the house and directed her to touch his penis. Count 2: The second incident, also when L. was eight, occurred while L. was sitting on the couch and appellant used his hand to touch L.'s vagina over her clothing. Count 3: When L. was 12 years old, appellant called her into the back bedroom and told her to touch his penis. Appellant then touched her leg and moved his hand up and down

on his penis. Count 4: While appellant and L. lived in the motor home, appellant told L. to remove her clothing and lie on the bed. He then directed her to open her legs. Appellant lay on top of her naked for approximately one hour. Count 5: While they lived in the motor home, appellant orally copulated L. Count 6: Also while in the motor home, appellant told L. to place her mouth on his penis.

Aside from the specific acts testified to in counts 1 through 6, L. also testified that appellant molested her regularly, beginning when she was eight. L. estimated that appellant touched her more than 30 times, and that after she turned 13, he touched her every day in a way that made her uncomfortable. When L. was 13, appellant touched her breasts on at least five occasions and "tongue kissed" her three times a week. In addition she also testified to two other occasions when appellant lay on top of her, one time while rubbing his penis against her vagina.

Because L. testified to so many acts, respondent argues the jury could have concluded that not all of the acts fell within section 288.5, leaving numerous uncharged acts for which the giving of CALCRIM No. 1191 was appropriate. But appellant argues that, while the jury had to find appellant engaged in a minimum number of sexual acts to convict appellant, there is no way to determine which acts the jury relied upon to find appellant guilty of the continuous sexual abuse charge. As argued by appellant, "The jury could have found he committed only three acts, or they could have found he committed all the acts." Appellant argues that, as in this case where the acts involved only one victim, requiring the jury to assess evidence of the charged offenses under two different standards posed a very real danger that the jury would be confused and apply the lower standard of proof.

Assuming arguendo that the instruction was given in error, a due process defect in using an instruction does not compel reversal in every case. "The United States Supreme Court has repeatedly held that the *Chapman* [*v. California* (1967) 386 U.S. 18, 24] test may be applied to verdicts rendered by juries instructed on mandatory presumptions violating the defendant's right to proof beyond a reasonable doubt of each element of the

charged offense. [Citations.] We see no reason for different treatment of instructional error involving a permissive inference." (*People v. James* (2000) 81 Cal.App.4th 1343, 1361-1362 [involving an instruction on propensity evidence of past domestic violence].) The question is whether, independently of the permissive inference, the jury actually rested its verdict on evidence establishing guilt beyond a reasonable doubt of the charged offense. "Because the inference before us [is] permissive, … we may conclude the error did not contribute to the verdict either if the evidence is so strong that the effect of the inference from propensity alone is insignificant, or if the evidence is such that we are convinced beyond any reasonable doubt the jury did not actually draw the improper inference." (*Id.* at p. 1363.)

Although principally based on the testimony of one witness, L., we would still characterize the evidence of appellant's guilt of the charged crimes as overwhelming. There is nothing in the record which causes us to doubt the credibility of L.'s testimony about any of the incidents of molestation, especially in light of the fact that appellant himself acknowledged in his telephone conversation with L. that some of those acts occurred. Moreover, appellant does not challenge on appeal the fact that there was sufficient evidence to convict him of the six lewd acts on a child or the charge of continuous sexual abuse of a child.

Nor do we think a reasonable juror would interpret the language of CALCRIM No. 1191 to authorize convictions of the charged offenses on a lowered standard of proof as suggested by appellant. While CALCRIM No. 1191 allows the jury to conclude from the uncharged conduct evidence that appellant was disposed to commit sexual offenses and, therefore, likely committed the current offenses, it nevertheless cautions the jury that it is not required to draw these conclusions and such a conclusion is insufficient alone to support a conviction. The instruction also states, "The People must still prove each element of every charge beyond a reasonable doubt." Furthermore, in this case, immediately after giving CALCRIM No. 1119, the trial court also specifically amplified the two different types of burden of proof, stating:

> "Now, one way to look at this—I want to explain this to you because it is talking about two different burdens. They have evidence that's related directly to the age of the complaining witness—12, 13 years old. We have a lot of other evidence that was admitted that covers various acts covering an entire spectrum, and it's not specifically related to the ages that are alleged in Counts 1 through 6 or in Count 7. Those are the uncharged offenses that we are not talking about. As to them, the prosecution has the burden to prove by a preponderance of the evidence that those allegations actually were committed by [appellant]. And a preponderance of the evidence means, basically, it is more likely than not true that it occurred. In other words, did the witness basically convince you? That's quite a bit different than guilty beyond a reasonable doubt. [¶] The prosecution has to prove, in the other acts, in order to find [appellant] guilty, beyond a reasonable doubt, and I defined that. And it's back in the definition. It talks about the abiding conviction. [¶] There [are] two different proofs, but you can use these uncharged crimes for only a unlimited[3] purpose, only for the purpose of determining whether or not [appellant] was predisposed to commit sexual offenses."

In addition, the court specifically instructed the jury, pursuant to CALCRIM No. 220, that "[a] defendant in a criminal case is presumed to be innocent" and that "[u]nless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal …." The jury was also instructed to consider the instructions as a whole and cautioned that "[s]ome of the[] instructions may not apply, depending on your findings about the facts of the case." (CALCRIM No. 200.)

We conclude any error in instructing the jury did not influence the verdicts and, therefore, was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

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[3]This portion of the instruction is not in written form. Respondent contends that this is a typographical error and the word should have been "limited" rather than "unlimited."